ESSAYS

THE HUMAN RIGHTS OF MIGRANTS IN GENERAL INTERNATIONAL LAW: FROM MINIMUM STANDARDS TO FUNDAMENTAL RIGHTS

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I. INTRODUCTION

The story of migrants is frequently portrayed as a story of abuse, violence, and racism. This narrative of tragedy has become commonplace for triggering attention of mass media and highlighting—consciously or not—the perils of being a migrant. This article proposes another story: Migration is a permanent feature of history, and it is framed by public international law. There is nothing surprising in this; the movement of persons across borders is international by nature since it presupposes a triangular relationship between a migrant, a state of emigration, and a state of immigration.

Though it was not free from controversies, the legal protection of migrants has a long lineage in the history of international law. One can even argue that, from its inception, international law has had a symbiotic relationship with migration. The very term “jus gentium” designated the set of customary rules governing the legal status of aliens under the law of ancient Rome. As far back as the 16th century, this Latin expression was specifically used to refer to the law of nations, before Jeremy Bentham coined the term “international law” in 1789. In the meantime, the movement of persons across borders was a typical subject of discussions among the founding fathers of international

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1. JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION §§ XXV, in 236 (Batoche Books 1999) (1789).
law, such as Francisca de Victoria,3 Hugo Grotius,4 and Emer de Vattel.5
Since then, migration has remained a topical issue of international concern, which mirrors the broader development of international law. A particularly telling case can be found in the human rights of migrants. The present article traces back their historical origins and analyses their primary features under contemporary international law. Though this issue has raised a considerable literature among contemporary scholars, human rights of migrants have been rarely approached from a general international law perspective.6
Such an approach proves to be particularly valuable for many reasons. Most notably, it provides the global frame of migrants’ rights and contributes to a better understanding of their legal environment and core content.

The systemic perspective proposed in the present article recalls that migrants’ rights are anchored in international law and reflect its evolution. This underlines in turn that most migrants’ rights are grounded in customary international law and are binding on every state. The legal protection of migrants has evolved from the notion of a minimum standard based on state responsibility to fundamental rights consecrated in human rights law, and, as such, available to every individual. As a result of this longstanding process, migrants’ rights are universal and must be respected, because migrants’ rights are human rights.
Against such a frame, part II of this article provides a historical account about the law of state responsibility for injuries committed to aliens. This was a classic question of international law which was crystallized through the notion of international minimum standards at the end of the 19th century and

7. Among a rich literature, see C. F. AMAGANSTRE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1967); Dionisio Antanzia, La Responsabilita Internazionale Dei Stati A Riasone Delle Dommage Subiti Par Les Etrangers, in 18 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 5, 5-29, 110-30 (philo, repr. 1987); Edwin M. Borchart, DIPLOMATIC PROTECTION OF CITIZENS ABROAD ON THE LAW OF INTERNATIONAL CLAIMS (1925); A. DUCREDRE-BORLAND, LA RESPONSABILITÉ INTERNATIONALE DES ÉTATS À Raison des Dommages Subis par Les Étrangers (Rouen & Co. ed., 1925); Frederick Wiedemann, Die Protection des Nationals: A Study in the Application of International Law (1912); Jacques Dumont, La Responsabilité Des États à Raison Des Crimes Et Délits Commis Sur Le Territoire D’un Étranger, in 38 RECUEIL DES COURS 183 (1931); F. V. Garcia, INJURIES TO ALIENS (1974); F. V. Garcia Amador, State Responsibility: Some New Problems, in 94 RECUEIL DES COURS 365 (1958); INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (Richard B. Lillicy, ed., 1983).
inherent to alienage. It further explains the longstanding interest of international law towards aliens. By contrast, classical international law has long been indifferent to the treatment of nationals within their own country who were left at the discretion of their sovereign state. As Hersch Lauterpacht observed, “the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State.”

This paradox corresponds to a specific stage in the evolution of international law when the individual was literally considered an object of international law and not a subject in his own right. The treatment resorted to aliens was not an exception but, on the contrary, a confirmation of this purely inter-state legal system. Individuals could be protected only because they embodied their state of nationality. This was epitomized by the Mavrommatis Judgment delivered in 1924 by the Permanent Court of International Justice:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is, in reality, asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

This inter-state monologue is further exacerbated by the discretionary nature of diplomatic protection. As restated by the IJC, “[the State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease.”

Thus, one should not be surprised that diplomatic protection has been a persistent source of tension among states—especially between western states and newly independent ones (notably in Latin America). Aliens in question were generally entrepreneurs from industrialized countries in search of new markets; moreover, diplomatic protection was used as a common pretext for intervention in disregard of the principles of sovereignty equality and non-interference in the domestic affairs of states, in this case developing

states. As a result, “[the history of the development of the international law on the responsibility of states for injuries to aliens is thus an aspect of the history of ‘imperialism,’ or ‘dollar diplomacy.’”

The conflicting interests at stake have been reflected by two opposite conceptions of the standard of treatment to be granted to aliens. First, developing states have advanced the doctrine of national treatment: Aliens must be treated on an equal footing with nationals (with the obvious exception of political rights). As a result, aliens cannot claim more rights than those granted to nationals and only a difference of treatment can trigger the responsibility of the host state. The doctrine of national treatment was endorsed at the First International Conference of American States held in Washington in 1889-1890. It has been reinforced at the regional level in several treaties, including the 1902 Convention relative to the Rights of Aliens, the 1928 Convention on the Status of Aliens, as well as the famous Montevideo Convention on the Rights and Duties of States adopted in 1933.

Nonetheless, international initiatives carried out by Latin American states have been primarily confined within their own region. At the universal level, the first Conference for the Codification of International Law, held in 1930 under the auspices of the League of Nations, demonstrated the absence of a broader consensus. The conference was unable to adopt the draft “Convention on Responsibility of States for Damage done in their Territory to the Persons or Property of Foreigners” mainly because of the different conceptions on the applicable standard: Seventeen states supported the doctrine of national treatment, whereas thirty-one others were opposed to it.

In contrast to the national treatment, Western states have promoted the
notion of minimum international standards, traditionally defined in the following terms:

Each country is bound to give to the nationals of another country in its territory the benefits of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.

There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. . . . If any country’s system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.23

Thus, according to such a notion, aliens shall not be treated below a minimum standard which is required by general international law regardless of how a state treats its own nationals. This doctrine has been endorsed in a substantial amount of treaties and jurisprudence.24 The content of the international minimum standard is, however, particularly vague. It has raised many controversies among states, some of them considering the ambiguity of the notion as the perfect excuse for justifying arbitrary interferences in host states. Nevertheless, as a result of these inter-state disputes, a considerable body of arbitral awards has progressively identified and refined the international minimum standard on a case-by-case basis. This incremental process has been crystallized in a core set of fundamental guarantees, including the right to life and respect for physical integrity, the right to recognition as a person before the law, freedom of conscience, prohibition of arbitrary detention, the right to a fair trial in civil and criminal matters, and the right to property (save public expropriation with fair compensation).25


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As is apparent from this enumeration, the minimum standard of treatment has been the forerunner of human rights law at the international level. It has been critical for infusing the rule of law in the field of migration. Nowadays, while it still retains some residual value, the international minimum standard is to a large extent absorbed by human rights treaties and customary law.

III. THE EMERGENCE OF INTERNATIONAL HUMAN RIGHTS LAW AS THE PRIMARY SOURCE OF PROTECTION

The law of aliens inherited from the traditional notion of state responsibility has been progressively marginalized and arguably replaced by human rights law.26 This reflects a more general and systemic evolution whereby human rights law is profoundly reshaping general international law.27 Even the ICJ acknowledged in the Dalia Judgment of 2007 that:

Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope ratio materiae of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.28

Upon closer review, human rights law constitutes a normative synthesis between the two traditional conceptions of the treatment granted to aliens by international law. On the one hand, this branch of law ensures that a core content of basic rights is guaranteed by international law in line with the very notion of a minimum standard. On the other hand, human rights law asserts equality of treatment between citizens and non-citizens in accordance with

the national standard. Myres McDougal, Harold Lasswell, and Lung-chu Chen acknowledge in this sense:

In sum, the principal thrust of the contemporary human rights movement is to accord nationals the same protections formerly accorded only to aliens, while at the same time raising the standard of protection for all human beings, nationals as well as aliens, far beyond the minimum international standard developed under the earlier customary law. . . . The consequence is thus . . . that continuing debate about the doctrines of the minimum international standard and equality of treatment has now become highly artificial; an international standard is now authoritatively prescribed for all human beings.29

Nevertheless, merging the old law of aliens and the new law of human rights has been progressive and it is still an ongoing process. One of the first systematic attempts was carried out by the International Law Commission (ILC). In 1953 the UN General Assembly requested that the ILC "undertake the codification of the principles of international law governing State responsibility."30 García Amador was appointed as Special Rapporteur in 1955 and, from 1956 to 1961, he submitted six reports focusing on the responsibility of States for injuries caused to aliens within their territory.31 His great ambition was "to change and adapt traditional law so that it will reflect the profound transformation which has occurred in international law. In other words, it will be necessary to bring the 'principles governing State responsibility' into line with international law at its present stage of development."32

According to Amador, traditional conceptions have shown their own limits for establishing clear-cut rules in this field.33 They must be reassessed in accordance with the dramatic transformations of contemporary international law deriving from the UN Charter and the international recognition of human rights:

International law is not now concerned solely with regulating relations between States, for one of the objects of its rules is to protect interests and rights which are not truly vested in the State. Hence it is no longer true, as it was for centuries in the past, that international law exists only for, or finds its sole raison d'être in, the protection of the interests and rights of the State; rather, its function is now also to protect the rights and interests of its other subjects who may properly claim its protection . . . . International law today recognizes that individuals and other subjects are directly entitled to international rights, just as it places upon them certain international obligations.

The basis of this new principle would be the "universal respect for, and observance of, human rights and fundamental freedoms" referred to in the Charter of the United Nations and in other general, regional and bilateral instruments. The object of the "internationalization" (to coin a term) of these rights and freedoms is to ensure the protection of the legitimate interests of the human person, irrespective of his nationality. Whether the person concerned is a citizen or an alien is then immaterial: human beings, as such, are under the direct protection of international law.34

Against such a "new" normative frame, the Special Rapporteur proposed in 1957 a draft Convention on international responsibility of the State for injuries caused in its territory to the person or property of aliens.35 In its final version published in his Last Report of 1961, article 1, paragraph 1 of the draft postulates that "aliens enjoy the same rights and the same legal guarantees as nationals," while specifying that as a minimum "these rights and guarantees shall in no case be less than the 'human rights and fundamental freedoms' recognized and defined in contemporary international instruments,"36 Its second paragraph then offers a non-exhaustive list of such fundamental human rights.37

33. Id. at 175.
34. Id. at 184, 192, 203.
37. Id. at 46-47.

The ‘human rights and fundamental freedoms’ referred to in the foregoing paragraph are those enumerated below: (a) The right to life, liberty and security of person; (b) The right to own property; (c) The right to apply to the courts of justice or to the competent organs of the State,
At the time, however, this pioneer work was a "somewhat revolutionary approach," as Amador himself acknowledged.38 In fact his draft received scant attention from the ILC and several members criticised his approach on the grounds that the individual was not a subject of international law and that the identification of human rights pertained to a different topic of codification than that of state responsibility.39 A new Special Rapporteur, Roberto Ago, was designated with the aim to focus exclusively on the secondary rules of state responsibility.40 That is to say, to define the general conditions under international law for the state to be considered responsible for wrongful actions or omissions, and the legal consequences to flow therefrom.41 As a result of this new approach, primary rules—and in particular the substantive and more sensitive obligations regulating the protection of aliens—were excluded from the work of the ILC.42

This failed attempt at reconciling the old law of aliens with the new law of human rights was largely due to the political and legal context of the time. During the 1950s and 1960s, Latin American states were not yet ready to abandon their own doctrine of national treatment for another one so similar to the notion of minimum standard. In Africa and Asia, newly independent states were also unwilling to codify the rights of aliens which were associated with imperialism and the diplomacy of their former colonial powers. Further-

by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms; (d) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the substantiation of any criminal charge or in the determination of rights and obligations under civil law; (e) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to present his defence personally or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence under national or international law, at the time when it was committed; the right to be tried without delay or to be released." Article 1, paragraph 3 of the final draft further specifies that: "The enjoyment and exercise of the rights and freedoms specified in paragraph 2 (a) and (b) are subject to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others.

Population and Development held the following year in Cairo; 49 the Summit for Social Development in Copenhagen in March 1995; 50 the fourth World Conference on Women organized in Beijing in September 1995; 51 and the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance held in Durban. 52 Alongside similar restatements of regional organizations, 53 the UN General Assembly has further reaffirmed “the need for all States to protect fully the universally recognized human rights of migrants, especially women and children, regardless of their legal status.” 54 From a systemic perspective, the very term “human rights of migrants” testifies to the appropriation of alienage by human rights law. However, such evolution is progressive and still incomplete in practice.

Despite the ancient lineage of migrants’ rights in international law, it was not until 1990 that the UN adopted a specific convention on migrant workers: the International Convention on the Protection of the Rights of All Migrant Workers.


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Workers and Members of Their Families (ICRMW). 55 Though it mainly restates and sometimes specifies the applicability of rights already enshrined in more general instruments, 56 this Convention conspicuously confronted a slow ratification process, leading to both a late entry into force and a small number of parties. It experienced the longest period for its entry into force of any of the core binding UN human rights instruments. Adopted in December 1990, the ICRMW entered into force almost thirteen years later in July 2003. 57 Even today, it remains poorly ratified compared to the other core human rights treaties. The Convention counts only forty-seven parties, 58 with ratification by major western immigrant-receiving countries still lacking. 59

A similarly poor number of ratifications can be observed with regard to the two conventions adopted by the International Labor Organization (ILO) for dealing with the specific situation of migrant workers. The 1949 Convention Concerning Migration for Employment (Revised) (No. 97) 60 is currently ratified by forty-nine states, 61 whereas the 1975 Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143) 62 counts only twenty-three parties. 63

However, this limited number of ratifications does not reflect the norma-
tive density of the matter for two main reasons. First, a wide range of regional and bilateral treaties have been regulating for various aspects of migration (including for labor purposes). To give only a few instances, more than 120 states are involved in regional economic integration schemes aimed at facilitating the movement of persons between states parties. 67 Furthermore, countries from the Organization for Economic Cooperation and Development (OECD) have alone entered into more than 176 bilateral labor recruitment agreements in 2004, a fivefold increase since 1990. 68

Second, all human rights treaties—though drafted for a more general purpose—are still plainly relevant in the field of migration. Despite and because of the lack of worldwide ratification of treaties specifically devoted to migrant workers, general human rights instruments are bound to play a vital role. Indeed they are generally applicable to everyone irrespective of nationality and/or frequently include specific provisions applicable to noncitizens. Besides the general principle of non-discrimination and equality before the law, 69 these instruments notably enshrine the right to leave any country and to return one’s own country, 70 the right of children to acquire a nationality 68 due process guarantees governing expulsion, 71 and protection against refoulement. 70 The added value of general human rights treaties is not only normative but also institutional: Their treaty bodies are crucial for advancing the protection of migrants within their respective mandates and

64. Patrick Tan, Rethinking Development and Migration: Some Elements for Discussion & unpublished working paper) (on file with the author).


67. See CRPD, supra note 66, art. 18(1)(a-b), (2); CRC, supra note 66, art. 10(2); CEDAW, supra note 66, art. 15(4); CRC, supra note 66, art. 10(2); CEDAW, supra note 66, art. 15(4); ICPR, supra note 66, arts. 24(2), 3; ICERD, supra note 66, art. 5(d)(ii).

68. See CRPD, supra note 66, art. 18(3)(a-b), (2); CRC, supra note 62, art. 7; CEDAW, supra note 66, art. 9; CRC, supra note 66, arts. 24(2), 3; ICERD, supra note 66, art. 5(d)(ii).

69. See CIC, supra note 66, art. 6. See also CRC, supra note 66, art. 10(1) (regarding family reunification).


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instruments. 71 General comments adopted by UN treaty bodies not only restate the applicability of human rights to noncitizens, but they also usually devote particular attention to migrants. 72 Furthermore, their concluding observations on State reports frequently address the rights of migrant workers as inferred from their relevant instruments. While the Human Rights Committee (HRC) is less systematic than the others, 73 the Committee on Economic, Social and Cultural Rights

71. For a similar account, see D. Weisbrodt & J. Rhodes, UN Treaty Bodies and Migrant Workers, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 303-28 (Vincent Chettri & Céline Baudou, eds. 2014). But see Isabelle Slinkin, Migrants’ Rights in UN Human Rights Conventions, in MIGRATION AND HUMAN RIGHTS 122, 143-148 (Paul de Guchteneere, Antoine Pécout & Ryszard Cholewinski, eds. 2009).


Finally, migrants can also bring individual complaints to the seven existing UN supervisory bodies currently competent (namely the HRC, the CERD, the CAT, the CEDAW, the CESCRI, the Committee on Enforced Disappearances, and the Committee on the Rights of Persons with Disabilities). The CAT is by far the most solicited UN treaty body. It has even become an anti-deportation committee, as between 80% and 90% of all individual complaints submitted to the CAT concern alleged violations of its Article 3 devoted to the principle of non-refoulement.78 At the regional level, the European Court of Human Rights is another particularly active treaty-body, which has regularly sanctioned violations of human rights committed against migrants.79 The European Court is not the only active regional body, as virtually all are concerned, such as the Inter-American and African Courts of human rights.80

In sum, as a result of a longstanding evolution, the traditional law of aliens grounded on diplomatic protection has been progressively superseded by human rights law, which has become in turn the primary source of migrants’ protection. This process is not confined to the specific situation of migrants, but reflects the broader evolution of general international law during the last century. The consequences of this phenomenon are both normative and institutional. Already in 1984, Richard B. Lillich rightly observed in his seminal book, The Human Rights of Aliens in Contemporary International Law, that:

What the international community is witnessing today is a major change—the significance of which cannot be overstated—in the way in which the rights of aliens are protected: from the classic system of diplomatic protection by the alien’s State of nationality, invoking the traditional international law governing the treatment of aliens, to the direct protection of the individual alien’s rights through his use of national and international procedures to enforce a set of reformulated international norms . . . 81

81. Richard B. Lillich, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 3 (Gillian M. White ed., 1984). This does not mean, however, that diplomatic protection has disappeared; this traditional institution coexists with national and supranational procedures which are comparatively more reliable simply because, as methods of enforcement, the latter are less discretionary and more objective than the former.
82. ICCPR, supra note 66, para. 17; UDHR, supra note 44, para. 17.
The principle of non-discrimination is a well-recognized norm of general international law and its impact on the legal position of non-citizens is quite straightforward. Interpreting Article 2(1) of the ICCPR, the HRC underlined:

In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens.

The HRC further delineated the basic rights of aliens deriving from the ICCPR. The list enumerated in its General Comment No. 15 on The Position of Aliens under the Covenant proves to be extensive:

Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of Article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

The fundamental rights listed therein are not only applicable to non-citizens; most of them are generally considered part of customary international law. Hence, the general applicability of human rights to non-citizens combined with the customary law nature of these fundamental rights have the consequence of anchoring migrants’ rights within general international law.

However, the position of migrants under public international law is qualified by two main considerations. First, some of the rights listed above are conditioned by the legal status of their beneficiaries. It is true that such rights are not numerous; only two rights proclaimed in the ICCPR require a legal presence within the territory. Nevertheless, their impact is both significant and representative because the two rights in question specifically refer to the movement of persons: A regular presence is required for the right to liberty of movement and freedom to choose a residence within the territory, as well as for due process guarantees governing expulsion from the territory.

The combination of these two provisions graphically exhibits the specificities and limits of the legal status of migrants under contemporary international law. A non-citizen must be lawfully within the territory of a state in order to benefit within that territory from the right to liberty of movement and freedom to choose his/her residence. But, even when lawfully within the territory, he or she may still be deported from that territory as long as some basic conditions and procedural guarantees are fulfilled.

87. Id. at 19, ¶ 7. Needless to say that all the rights consecrated in the ICCPR have been reaffirmed in many other human rights treaties notably at the regional level.
tension is a defining feature of alienage.

The rationale behind limiting rights based on an alien's legal status is clearly related to the traditional power of states to regulate entries and stays within their own territory. As acknowledged by the HRC, “the question whether an alien is ‘lawfully’ within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State’s international obligations.” While states retain a substantial margin of appreciation, this does not mean that they have a purely discretionary power for deciding upon admission of non-citizens. Here again the legal position of migrants mirrors a broader transformation of the international legal order, which has evolved from a law of coexistence towards a law of interdependence.

As a result of this structural evolution of public international law, territorial sovereignty is both a competence and a responsibility. Against such normative background, the competence to regulate admission in domestic legislation must be exercised in due accordance with the legal norms of international law.

The international legal norms governing migration control are more substantial and numerous than is frequently assumed by policy-makers. The most relevant ones are the principle of non-refoulement, the right to family unity, the prohibition of arbitrary detention, the prohibition of collective expulsion, and states' duties to admit their own nationals. Though their respective content and legal basis cannot be detailed here, each of these norms is not only acknowledged in numerous treaties but also arguably grounded in customary international law.


96. For further discussions about their legal basis and content under customary international law see Vincent Chetail, The Transnational Movement of Persons Under General International Law: Mapping the Customary Law Foundations of International Migration Law, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 1-74 (Vincent Chetail & Celine Bastide eds., 2014).

Besides the limits deriving from the state’s competence in the field of admission, the general principle of non-discrimination is subject to a second type of impediment closely related to the nature of the rights at stake. Indeed the position of migrants under general international law is more precarious when it comes to economic, social, and cultural rights. From a purely legal perspective, this may be surprising for, in contrast to civil and political rights, none of the rights endorsed in the ICESCR are conditioned by the nationality or legal status of their beneficiaries. However, most of these rights are progressively applicable depending on the resources available in each state. The principle of non-discrimination is nonetheless well acknowledged as a basic guarantee which “is neither subject to progressive implementation nor dependent on available resources.”

This obligation of immediate implementation relies on the mandatory terms of Article 2(2) of ICESCR which requires each state party “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status.” The CESCR rightly inferred from this fundamental and straightforward obligation that “[t]he Covenant rights apply to everyone including


97. As enunciated in Article 2(1) of the U.N. International Covenant on Economic, Social and Cultural Rights (ICESCR), “[e]ach States Parties to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.” ICESCR, supra note 95, art. 2(1).


99. ICESCR, supra note 96, art. 2(2).
non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.\textsuperscript{100}

Nonetheless, contrary to its counterpart in the ICCPR, the principle of non-discrimination under the ICESCR is limited by a noteworthy—albeit circumstanced—exception. According to Article 2(3), "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.\textsuperscript{103} As any exception to a principle, this one should be restrictively interpreted (especially when the principle at stake is so fundamental and represents one of the funding backbones of the Covenant). Furthermore, the wording of this provision is circumscribed by three substantial cumulative conditions regarding the states concerned, the nature of the rights subjected to this exception, and the degree of permissible restrictions to them.

Regarding the first condition (the states concerned), Article 2(3) is a permissive, not a mandatory provision which can be invoked only by "developing countries.\textsuperscript{102} The notion of developing countries being a factual rather than a legal one, it is commonly understood as including "countries which have gained independence and which fall within the appropriate United Nations classifications of developing countries.\textsuperscript{103} Although this kind of qualification referring to a particular type of State may be found in international trade law and other related areas, it remains quite unique in the field of human rights law. This specificity may be understood in the historical context which prevailed during the drafting of the ICESCR. Article 2(3) is a remnant of the traditional law of aliens and the longstanding debates between newly independent states and western states. The delegate of Indonesia who proposed this provision explained that its only purpose was to protect the rights of nationals of former colonies against the abuses deriving from "the dominant economic position enjoyed by [mostly western] foreigners as a result of the colonial system."\textsuperscript{104} In summing up the debates between the delegations, the Third Committee of the General Assembly further insisted that:

\textsuperscript{101} ICESCR, supra note 96, art. 2, ¶ 3.
\textsuperscript{102} Id.
\textsuperscript{103} Limburg Principles, supra note 98, ¶ 44.
\textsuperscript{104} U.N. GAOR, 17th Sess., 1118th mtg. at 258, ¶ 37, U.N. Doc. A/C.3/SR.1185 (Nov. 16, 1962). Although the Committee on Economic, Social and Cultural Rights has not specified for the moment the meaning of this provision, the Limburg Principles reassert that "the purpose of article 2(3) was to end the domination of certain economic groups of non-nationals during colonial times." Limburg Principles, supra note 98, ¶ 43.
used to avoid articles 17, 18, and 19 of the Refugee Convention governing access to employment. Article 5(2) of the ICESCR ensures indeed that more favourable treatments granted by any other domestic legislation and treaties remain plainly applicable. This safeguard clause has further far-reaching effects with regard to more favourable treatment enshrined in regional human rights treaties, for both the 1981 African Charter on Human and Peoples Rights and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. It guarantees the right to work without any discrimination. In such case, Article 2(3) is literally neutralised.

In addition to due respect for other human rights and more favourable treatment, restrictions on the economic rights of non-citizens are further conditioned by the state of their national economy. Although developing countries retain a substantial margin of appreciation, some commentators have argued that Article 2(3) can be triggered “only when the state of the economy of the nation as a whole so warrants.” In sum, despite the apparent vagueness of its wording, Article 2(3) represents a limited and balanced exception to the principle of non-discrimination. More fundamentally, it remains—for the moment at least—a rather virtual exception, for “no developing State has sought to invoke it.” Save for a possible future invocation of Article 2(3), the principle of non-discrimination constitutes thus an “immediate and cross-cutting obligation” binding all state parties.

From the broader perspective of general international law, the prohibition of discrimination is acknowledged as a well-established principle. Nonetheless, its concrete implications are not always obvious as the principle of non-discrimination does not prohibit all differences of treatment. A differential treatment is still permissible provided that it has a legitimate aim and the criteria for such differentiation are “reasonable and objective.”

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114. ICESCR, supra note 96, art. 5, § 2.
117. Dankwe, supra note 109, at 242.

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125. This interpretation has been notably confirmed by the European Court in the M.S.S. v. Belgium & Greece, ¶¶ 365-79, 2011 Eur. Ct. H.R. Although it recalled, in line with its previous jurisprudence, that Article 3 does not “enatt any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living,” the Court acknowledges the particular vulnerability of asylum seekers: “The Court attaches considerable importance to the applicant’s status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection. It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union’s Antipersonnel Landmines Directive.” M.S.S., ¶ 249, 251. While referring to the complementary obligation to provide decent material conditions under the EU Reception Directive, the Court concludes that “the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential
highlighting the interdependent and interrelated nature of human rights can be observed with regard to some of the core labour rights reaffirmed in several widely ratified ILO treaties.126

Besides the widespread and representative participation to these treaties, the customary nature of the basic norms enshrined therein can be inferred from the ILO Declaration on Fundamental Principles and Rights at Work:

All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour, and
(d) the elimination of discrimination in respect of employment and occupation.127

needs . . . have attained the level of severity required to fall within the scope of Article 3 of the Convention.” Id. ¶ 43.

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The plain applicability of these basic rights to migrants has been further confirmed in 2004 at the 92nd International Labour Conference:

The fundamental principles and rights at work are universal and applicable to all people in all States, regardless of the level of economic development. They thus apply to all migrant workers without distinction, whether they are temporary or permanent migrant workers, or whether they are regular migrants or migrants in an irregular situation.128

At the regional level, the Inter-American Court of Human Rights has come to a similar conclusion in its Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants.129 The Court has deduced from the principle of non-discrimination and equality before the law some far-reaching assertions regarding labour rights of migrant workers:

A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination. In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment.130

V. CONCLUSION

Migration is framed by general international law. This has always been the case even if the trivialisation of immigration control has contributed to obscuring the role of international norms to such an extent that this field is

Interdisciplinary Research Grp. on Int’l Agreems & Dev., Working Paper No. 1, 2003). One should add that discrimination in employment is defined by Art. 1(1) of ILO Convention No. 111 as comprising “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.” International Labour Organization, Convention Concerning Discrimination in Respect of Employment and Occupation art. 1, ¶ 1, June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960). However, the prohibited ground of “national origin” that is traditionally retained in this kind of non-discrimination clause was substituted by the more ambiguous term “national extraction.” Id.

frequently confused with domestic jurisdiction. This article makes clear that the
human rights of migrants are an integral part of public international law
and mirror its broader evolution.

The main challenge remains in its implementation at the domestic level.
This is arguably not so different from many other branches of international
law which are at the crossroads of state sovereignty and individuals’ rights
(such as the law of armed conflicts). Nevertheless it has become a common
place to observe the “gulf between proclaimed standards and their
application to migrants,” as regularly denounced by non-governmental organi-
sations and the UN. Migrants are structurally vulnerable to abuses as
non-citizens, and their undocumented status can aggravate such vulnerabil-
ity. Other external factors—such as recurrent economic crises, the spectre
of terrorist violence, political manipulations, and electioneering—have led to
an environment fertile to violations of migrants’ rights.

Nonetheless, the last decade has witnessed a growing awareness of their
vulnerability and the corresponding need to ensure due respect for migrants’
rights. A plethora of initiatives and instruments have been adopted by states
and international organisations with the result that “migrants’ rights today
are more clearly recognizable as human and labour rights.” From a more
general perspective, this ongoing tension between rights and reality echoes
the schizophrenic nature of an international legal system which is grounded
on two contradictory driving forces. On the one hand, due respect of
non-discrimination is primarily ensured by a decentralised scheme entrusted
to nation states. On the other hand, the “universal respect for, and observance
of, human rights and fundamental freedoms for all without distinction” is
acknowledged as one of the founding principles of the international legal

131. Chełkowski, supra note 6, at 180.
132. Jorge A. Bustamante, Extreme Vulnerability of Migrants: The Cases of the United States and
133. In addition to the already substantial number of resolutions and related soft law instru-
ments mentioned above from footnotes 47 to 54, see U.N. High Comm’t for Refugees, Refugee Protection
and Mixed Migration: A 10-Point Plan of Action (Jan. 2007); Council of Eur., Commn. of Ministers,
Parl. As., Resolution 1509: Human Rights of Irregular Migrants, Doc. No. 10924 (2006); Interna-
tional Organization for Migration, International Agenda for Migration Management: Common
Understanding and Effective Practices for a Planned, Balanced, and Comprehensive Approach to
the Management of Migration 26-30 (Dec. 16-17, 2004). Though it cannot be confused with soft law
instruments adopted by states and international organizations, similar academic initiatives can play a
role for raising awareness of migrant’s rights and promoting their effective respect. This is the noble
purpose of the International Migrant Bill of Rights Initiative, which started in 2005 as a student-led
project through Georgetown Law’s Global Law Scholars Program. This twenty-three article Bill of
Rights mainly restates, sometimes elaborates and further develops well-established norms of
international law though. INT’L MIGRANTS BILL OF RIGHTS (Int’l Migrants Bill of Rights Initiative
info.cfm, 28 GEO. IMMIGR. L.J. 9 (2014). As rightly observed by Gerald Neuman, it appears to be “a
manifesto in the shape of a restatement.” Gerald Neuman, A Migrants’ Bill of Rights—Between
134. Ryżard Chełkowski, Human Rights of Migrants: The Dawn of A New Era?, 24 GEO. IMMIGR.
135. U.N. Charter, art. 55, para. c.